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No. 77-1394

In the Supreme Court of the United States

OCTOBER TERM, 1977

QUICK PAK, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 16a) is reported at 570 F. 2d 649. The decision and order of the National Labor Relations Board (Pet. App. 1a-15a) are reported at 223 NLRB 1080.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1978. The petition for writ of certiorari was filed on March 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging ten employees because of their union activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 140, 73 Stat. 525, 29 U.S.C. 158), are:

> Section 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

STATEMENT

1. The Board found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging ten of its employees in response to their union activity (Pet. App. 1a-15a). The court of appeals sustained the Board's findings (Pet. App. 16a). The relevant evidence is as follows:

On May 29, 1975, 19 of petitioner's 40 employees met during their lunch hour with Pete MacCagno, a representative of the International Association of Machinists and Aerospace Workers, AFL-CIO, in an open park directly across from petitioner's plant. They discussed the possibility of forming a union at the plant, and all 19 employees present signed union authorization cards. Two of the signers, Janice Weaver and Pat North, then went to the plant lunchroom, where Weaver secured the signatures of four more employees. (Pet. App. 4a.) Weaver and North next unsuccessfully solicited the signature of supervisor Bonnie Harper. They then met

MacCagno and the other employees at the plant parking lot, where Weaver handed MacCagno the four additional cards. At that time, petitioner's general manager Tom Brown was standing at the loading dock next to the plant entrance, about 25 feet from MacCagno (who was wearing an IAM button) and the pro-union employees. (Pet. App. 5a; A. 27.)[1]

Shortly after lunch Supervisor Harper went to Brown's office for a meeting. Two hours later Harper returned to her place on the assembly line with a list of ten employees ~~(all of whom had signed union authorization cards)~~, whom she ordered to report to Brown. Nine (all of whom had signed union authorization cards) did so.[2] Brown then told the nine that they were laid off immediately for lack of work; Harper, however, stated the layoffs were due to the employees' poor work records. The nine were then given their normal payroll checks for the preceding week, plus personal checks signed by petitioner's president, Diane Brown, wife of the general manager. (Pet. App. 5a.)

The Board, adopting the decision of the administrative law judge, concluded that general manager Brown "became aware of the extensive union activity across the street, that, through personal observation or that of Supervisor Harper, he learned generally the identity of most of those involved [and], that almost immediately, in seclusion with Harper, he selected from his 'work records' the ten discriminatees, and proceeded to terminate them * * *. [B]ut for their open union activity on May 29, these employees, plus Carrie White, would not have been laid

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[1] "A." refers to the Appendix to the briefs of the parties in the court of appeals.

[2] The tenth, Carrie White, was absent from work that day (Pet. App. 5a).

off on May 29" (Pet. App. 8a).[3] The Board rejected petitioner's argument that legitimate business considerations prompted the layoffs, noting that, while the ten did have poor records, (a) their absenteeism and tardiness had been tolerated for a long time without adverse action; (b) the decision to lay off was not made until after the union activities began, and was then enforced within three hours; and (c) that same morning, prior to the union activities, all employees were told they would have to work overtime on Saturday (Pet. App. 7a-8a).

The court of appeals concluded that the Board's decision was "supported by substantial evidence on the record considered as a whole" (Pet. App. 16a).

ARGUMENT

Petitioner contends (Pet. 9-11) that the Board failed to prove that the discharges were motivated by the employees' union activity. That question raises only evidentiary issues which do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

In any event, there is ample support in the record for the Board's findings. The general manager discharged the employees immediately after he observed their union activity. No final payroll checks were ready and personal checks were substituted. Nor does the record support the Company's asserted reasons for the terminations.[4]

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[3]While White had not taken part in the May 29 union activities and did not sign a union card until the following day, the Board found that, but for the union activities "of the other [nine] employees, White, too, would not have been terminated" (Pet. App. 8a, n. 6).

[4]The general manager claimed that the layoffs were occasioned by a lack of work, even though on the morning of the discharge employees were told they would have to work overtime that Saturday. Their supervisor claimed the discriminatees were laid off for poor work records. At the Board hearing, the Company suggested "poor work records" meant absenteeism and tardiness (Pet. App. 6a n.5). The Company failed to show, however, that absenteeism and tardiness had ever been a significant factor in the employees' evaluations. To the contrary, the record showed that several employees with poor attendance records received promotions, pay raises, and compliments. In the three-month period from March to May, one discriminatee, Janice Weaver, was absent five times and tardy 17 times; nevertheless, in April, she received a pay raise (A. 31), was praised by her supervisor for being "the fastest machine operator in the plant" (A. 39), and was never reprimanded or warned about her attendance record (A. 52). Two other discriminattees, Pat North and Wanda Evans, had recently been promoted to "line leaders" (A. 54, 62, 73, 124-125).

Petitioner further contends (Pet. 6-9) that the Administrative Law Judge denied it due process when he denied its request to "test the credibility" of employee Weaver by cross-examining her on documents she filed with federal and state equal employment agencies and the state unemployment commission. There is no merit to that contention. Contrary to petitioner's assertion (Pet. 7), it is irrelevant that Weaver's statements to other government agencies did not mention union activities as the basis for discharge.

The general manager had told the employees they were being laid off for lack of work, and Weaver stated as much to the unemployment commission. Moreover, when Weaver filed charges with the equal employment agencies she may have believed that she had been discriminated against for reasons other than, or in addition to, union activities. As this Court recently observed, "[n]o matter how honest one's belief that he has been the victim of discrimination * * * the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial." *Christianburg Garment Co.* v. *Equal Employment Opportunity Commission*, No. 76-1383,

decided January 23, 1978 slip op. 9. In these circumstances, the ALJ's restriction of cross-examination did not deny petitioner due process. Moreover, the Board did not base its findings on the employees' subjective view of the Company's motivation, but on its assessment of the Company's motivation based on the circumstances surrounding the discharges.

To the extent that petitioner was attempting to attack Weaver's general credibility, it was not prejudiced by the judge's ruling in any event. The judge did discredit portions of Weaver's testimony (Pet. App. 4a, n. 4; 9a, n. 7). He accepted her testimony only insofar as it was corroborated by MacCagno (A. 21-29) or concerned incidents involving Harper which Harper either corroborated (A. 49, 134-135) or did not deny (A. 38, 43-45). A trier of fact need not believe all of a witness's testimony before he may believe any of it. *National Labor Relations Board* v. *Universal Camera Corp.*, 179 F. 2d 749, 754 (C.A. 2), vacated and remanded on other grounds. 340 U.S. 474.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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